UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.	)	
and	)	**Case 12-CA-25764**
MICHAEL CUDA, an Individual	)	

RESPONDENT'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS EXCEPTIONS AND ANSWERING BRIEF TO GENERAL COUNSEL'S EXCEPTIONS

INTRODUCTION

In light of the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 2011 WL 1561956 (2011), decided on April 27, 2011, Respondent D.R. Horton, Inc. (the "Company") submits this brief as a supplement to the Company's (1) Brief in Support of Exceptions to the decision of the Administrative Law Judge ("ALJ"), and (2) Answering Brief to the General Counsel's Exceptions to the ALJ's decision (collectively, "Respondent's Briefs").

SUMMARY OF ARGUMENT

In Respondent's Briefs, the Company argued that (1) individual waivers of collective claims are legally enforceable (and therefore that the Company's Mutual Arbitration Agreement is enforceable), and (2) the Federal Arbitration Act ("FAA") preempts the General Counsel's attempt to interpret the Company's Mutual Arbitration Agreement ("Arbitration Agreement") in a manner that is inconsistent with the FAA. The Supreme

Court's decision in *AT&T Mobility* deals squarely with these issues and further reinforces the Company's arguments.

ARGUMENT

In *AT&T Mobility*, the Supreme Court expressly held that the FAA protects an employer's right to include a waiver of class and collective actions in an arbitration agreement, even though another law may, in some way, instruct otherwise. The Court relied on the plain text of Section 2 of the FAA which provides that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As the Court stated, "the savings clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *AT&T Mobility LLC*, 2011 WL 1561956 at 1 (citing *Doctor's Associates, Inc., v. Casarotto*, 517 U.S. 681, 687 (1996)).

The Supreme Court considered a rule established by the California Supreme Court that declared waivers of class action claims in compulsory arbitration agreements to be unconscionable. The issue before the U.S. Supreme Court was whether such a rule was a ground "for the revocation of any contract" as stated in the specific and limited list of exceptions to enforcement found in Section 2 of the FAA.

In reaching its decision, the Court examined the purposes of the FAA and noted the "national policy favoring arbitration" and the "liberal federal policy favoring arbitration." *Id.* at 9. The Court emphasized that arbitration is "a matter of contract" and "the FAA ***requires*** courts to honor parties' expectations." *Id.* at 12 (citing *Rent-A-Center, West*, 561 U.S. __, 130 S. Ct. 2772 (2010)) (emphasis added).

The Court ultimately held the California rule prohibiting compulsory arbitration agreements containing class action waivers is impermissible because the rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and thus "the rule is preempted by the FAA." *AT&T Mobility LLC,* 2011 WL 1561956 at 13. As stated by the Court:

> The overarching purpose of the FAA, evident in the text of §§2, 3, and 4, is to ensure the enforcement of arbitration and agreements according to their terms so as to facilitate streamlined proceedings. ***Requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.***

Id. at 8 (emphasis added).

Although the Court's decision involved the FAA's preemption of a rule created by a state court, it is equally applicable to the facts in the instant matter. As stated in Respondent's Briefs, the concept of what "employees reasonably could believe" in relation to the Arbitration Agreement (as urged by the Acting General Counsel) contradicts the straightforward approach to contract interpretation mandated by the FAA. The General Counsel's urged action would impose precisely the sort of extra-contractual hurdle to enforcement that (1) Congress rejected by enacting the FAA and (2) the Supreme Court flatly denounced in *AT&T Mobility.*

Additionally, in *AT&T Mobility*, the Supreme Court specifically found that many of the advantages recognized in the strong federal policy favoring arbitration would be lost in class arbitrations. *AT&T Mobility LLC,* 2011 WL 1561956 at 12. In doing so, the Court explicitly blessed the use of class action waivers in arbitration agreements. Any ruling to the contrary would thwart the Court's directives.

CONCLUSION

The decision and recommended Order of the Administrative Law Judge should be upheld by the Board on those points excepted to by the General Counsel; the Company's exceptions should be sustained; and the complaint against D. R. Horton, Inc. should be dismissed.

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served by electronic mail on:

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on May 6, 2011

Bernard P. Jeweler